



Comptroller General
of the United States
Washington, D.C. 20548

150743

Decision

REDACTED VERSION'

Matter of: Essex Electro Engineers, Inc.

File: B-250862

Date: February 23, 1993

Michael R. Hatcher, Esq., Israel and Raley, for the protester.
Demetria T. Carter, Esq., and Daniel Laquaite, Esq., Department of the Navy, for the agency.
Jacqueline Maeder, Esq. and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency's exclusion of an offer from the competitive range because of the agency's belief that the price was too low under a solicitation for a fixed-price contract is unreasonable because the agency should have discussed with the offeror the discrepancy between offeror's price and government's estimate.

DECISION

Essex Electro Engineers, Inc. protests the elimination of its low priced proposal from the competitive range and the subsequent award of a contract to Technical Services Laboratory, Inc. under request for proposals (RFP) No. N00421-92-R-0086, issued by the Department of the Navy, Naval Air Warfare Center, Patuxent River, Maryland, for a load bank to be used to simulate constant power load characteristics of aircraft radar equipment.

We sustain the protest.

The decision, issued on February 23, 1993, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[deleted]."

The RFP contemplated the award of a fixed-price contract for the load bank to the technically acceptable, low priced offeror. The acceptability of technical proposals was to be determined in accordance with six factors: (1) electrical design, (2) mechanical design, (3) thermal design, (4) parts and materials, (5) reliability and maintainability, and (6) safety and capability. To determine whether prices submitted were "fair and reasonable," offerors were instructed to provide the current catalog or established price list for the load bank offered and a history of recent sales. If such information was unavailable, offerors were to provide the unit cost for purchased parts, raw materials, and labor (broken into hours and cost per hour). Manufacturing overhead, general and administrative costs and profit were to be provided as percentages of the total cost.

The Navy received five proposals, including Essex's, in response to the RFP. Essex offered to supply its Model #B691 load bank system. Technical proposals were evaluated by a three-member Technical Source Selection Evaluation Board (TSSEB). Among other things, the evaluators noted that three offerors, including Essex, were proposing major design and development efforts. The evaluators found all five proposals technically unacceptable but capable of being made acceptable.

Prices varied greatly, from Essex's low offer of [deleted] to a high offer of \$498,600. Essex did not provide the price information requested by the solicitation, but did include a listing of completed contracts for load banks and the contract prices.

Because the prices were so varied, the contracting officer requested that the TSSEB chairperson comment on the costs involved in supplying the load banks. In response, the chairperson of the TSSEB stated that an offer involving major design/development work of less than \$80,000 "probably reflects a miscalculation of the task required by the solicitation and would result in a loss for the offeror. A bid of less than \$120,000 probably would leave the offeror with less profit than he expects." The agency's overall estimate for the work was [deleted].¹

¹The agency's "ballpark" estimate was based on its acquisition of two constant resistance load banks in December 1990. The contract price for these load banks was [deleted] per unit. Because the load bank to be acquired under this solicitation is more complex, the agency estimated that the load bank would cost "twice or thrice as much" as the load banks acquired in 1990. The agency states that "[f]or fiscal planning purposes, the larger (hence more (continued...))

The contracting officer compared Essex's price to the prices offered by the other offerors, the government estimate and the price calculated by the TSSEB chairperson to be the minimum needed for a major design effort and determined that Essex's price was unreasonably low. The agency questioned how the offeror could undertake such a major design effort at such a low price and concluded that Essex's low price was "symptomatic of a major miscalculation of the effort required by the contract" and represented an unacceptable risk. The agency states that its "technical personnel knew that the price proposed by Essex indicated that it had not accurately analyzed the time, effort, and expense necessary to take a design from a proposal plan to a finished product." Accordingly, the agency concluded that Essex did not have a reasonable chance for award and its proposal was excluded from the competitive range.²

Discussions were held with the three competitive range offerors following which all three submitted best and final offers (BAFO). Based on the evaluation of BAFOs, award was made to Technical Services for \$107,600.

Essex argues that it was improper for the Navy to exclude from the competitive range its proposal, which was found to be technically equal to the others, simply because its price was significantly lower than the agency's estimate. In this connection, Essex states that the rationale cited by the agency for its conclusion, that Essex's price was too low to support its major design and development effort, is based upon the false premise that the protester needs to undertake such an effort in order to supply a compliant load bank. Essex states that "[a]t no point in its proposal did [it] indicate that any major design and development effort would be needed to meet all of the requirements of the [a]gency's specification." The protester contends that it "routinely and successfully manufactures load banks" and that it has recently manufactured for another agency a load bank similar to the one required here for [deleted].

¹(...continued)

conservative) multiple was assumed and the dollar figure was rounded off to [deleted]."

²The agency also concluded that the highest priced offeror had no reasonable chance for award and its proposal, too, was eliminated from the competition.

The purpose of a competitive range determination in a negotiated procurement is to select those offerors with which the contracting agency will hold written or oral discussions. Federal Acquisition Regulation (FAR) § 15.609(a); Miller Bldg. Corp., B-245488, Jan. 3, 1992, 92-1 CPD ¶ 21. The competitive range consists of all proposals that have a reasonable chance of being selected for award, usually those proposals which are technically acceptable as submitted or which are reasonably susceptible to being made acceptable through discussions. Id. While a contracting officer necessarily has a considerable range of discretion in making a competitive range determination, that discretion is not unfettered and the determination must have a reasonable basis. S&M Property Mgmt., B-248051, June 28, 1991, 91-1 CPD ¶ 615. Here, for the reasons set forth below, we agree with Essex that the Navy did not have a reasonable basis for excluding its low priced proposal from the competitive range.

The record does not contain evidence to support the technical evaluators' conclusion that Essex "intend(ed) to design and develop a load module" in order to meet the RFP requirements. We can find nothing in the firm's proposal which indicates that this is so, and the protester denies that it will have to undertake such an effort. As noted above, the protester maintains that it never stated in its proposal that it would undertake a major design effort and says that it has "routinely and successfully" manufactured similar load banks in the past.

Nevertheless, the Navy based its conclusion as to the insufficiency of Essex's price on the assumption that such an effort would be undertaken. The agency assumed, based upon its view of the proposal, that the protester's low price was simply the result of the firm's failure to comprehend the scope of the effort required. Under these circumstances, the discrepancy could have been the result of the firm's particularly-skilled and experienced personnel or the result of the firm's unique and innovative technical approach. The agency does not identify anything in the protester's technical proposal which would indicate that the former conclusion is more reasonable than the latter one.¹

¹The Navy does point out that Essex did not provide the price information/sales history requested by the solicitation to determine if its price was "fair and reasonable." While an offeror must submit an adequate proposal, we do not view the omission of catalog prices or sales history from its initial proposal to have been so material as to require exclusion of Essex's proposal from the competitive range, especially where, as here, the defect
(continued...)

In this regard, a contracting agency should not reject a fixed-price proposal because the offeror's price differs significantly from the agency's estimate, unless the estimate was disclosed to the offerors or discussions were conducted with the offeror concerning the discrepancy. See Allied Cleaning Servs., Inc., 69 Comp. Gen. 204 (1990), 90-1 CPD ¶ 275.

Here, the price obtained from an admittedly very experienced offeror, Essex, was substantially below the prices received from the other offerors and the agency's estimates. The technical ratings for all offerors were equal. Under these circumstances, we do not think that the contracting officer could reasonably eliminate the Essex proposal because of its low price. Rather, the agency should have conducted discussions to eliminate any concerns it had about the price. We do not believe that the Navy, in the absence of discussions with Essex, could have reasonably determined that the Essex proposal had no chance for award. See S&M Property Mgmt., supra.

We recommend that the Navy include the Essex proposal in the competitive range and solicit new BAFOs. If, after doing so, the agency concludes that an offeror other than Technical Services is entitled to receive award under the solicitation criteria, Technical Services' contract should be terminated and award made to the proper firm. We also find that the protester is entitled to recover its costs of filing and pursuing its protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1993).

The protest is sustained.

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³(...continued)
could easily be cured through discussions. See Leigh Instruments Ltd., B-233270, Mar. 3, 1989, 89-1 CPD ¶ 232. Moreover, as noted above, Essex did provide some information as to its prices on completed contracts for similar items.